IN THE
SUPREME COURT OF THE UNITED STATES

No. 77-560

October Term, 1977

JO ANN EVANS GARDNER,

Petitioner,

v.

WESTINGHOUSE BROADCASTING COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Jo Ann Evans Gardner, Petitioner herein, prays this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit which was entered in this case on June 6, 1977.

Statute Involved

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra) has not yet been officially reported. The opinion is set forth in the Appendix, as is the Court of Appeals' order denying rehearing and the Opinion Sur Denial of Petition for Rehearing. (App. B, infra) The opinion of the district court has not been officially reported, and is set forth in the Appendix (App. C, infra)

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1977. Jo Ann Evans Gardner's timely petition for rehearing was denied by the Court of Appeals on July 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

This case involves the interpretation and application of the Act of June 25, 1948, c.646, 62 Stat. 929, 28 U.S.C. § 1292(a)(1), which is set forth in the Appendix. (App. D, infra)

Question Presented

QUESTION PRESENTED

Whether the denial of class action certification in an employment discrimination case where class-wide injunctive relief is requested is immediately appealable as an interlocutory order refusing an injunction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE CASE

The instant action was commenced by Jo Ann Evans Gardner (hereinafter Gardner) as a class action seeking declaratory, injunctive, and consequent monetary damages to redress Westinghouse Broadcasting Company's (hereinafter Westinghouse's) denial of equal employment opportunity to females. Jurisdiction was alleged pursuant to Title VII of The Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq, and Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania.

Gardner, an unsuccessful applicant for employment as a talk-show host with one of Westinghouse's radio stations located in Pittsburgh, Pennsylvania, sought to represent all females adversely affected by Westinghouse's claimed company-wide policy of discrimination against females on the basis of their sex by, inter alia,

failing to hire or promote them to executive, managerial, professional, or technical positions. Gardner's complaint reveals that she claimed authority to represent the class by virtue of Fed. R. Civ. P. 23(b)(2). The complaint requested a permanent injunction on behalf of the class, curtailing all of Westinghouse's unlawful employment practices which adversely affect the class of females.

In accordance with the requirements of Fed. R. Civ. P. 23(c)(1) and Local Rule 34(c) of the Rules of Court of the United States District Court for the Western District of Pennsylvania, Gardner filed a Motion to Determine a Class within ninety (90) days of the filing of the complaint. Gardner also propounded interrogatories to Westinghouse in an effort to enable her to define the scope of the class. Westinghouse objected to all interrogatories which sought information as to any of its radio stations apart from Station KDKA in Pittsburgh.[1] Gardner filed a Motion to Compel Discovery in order to obtain complete answers to the interrogatories requesting information as to Westinghouse's other radio stations.

By Memorandum and Order dated February 3, 1976, the District Court denied both the Motion to Determine a

1. Westinghouse owns and operates seven (7) radio stations throughout the United States.

Class and the Motion to Compel Discovery. The ruling on the latter motion was the direct result of the decision to deny class certification. Denial of class status was predicated on the District Court's view that the requirements of Fed. R. Civ. P. 23(a)(2), (a)(3), and (a)(4) were not met. (App. C, infra at 38a - 39a)

Thereupon, Gardner, on her own behalf and on behalf of the class she sought to represent, appealed the order refusing class certification to the United States Court of Appeals for the Third Circuit. Westinghouse filed a Motion to Dismiss Appeal for Lack of Jurisdiction, which Motion was granted by the Third Circuit.

In support of her right to maintain this appeal, Gardner argued, inter alia, that the denial of class certification amounted to the effective denial of the broad injunctive relief sought on behalf of the class and constituted an order of immediate and irreparable consequences; thus it was appealable pursuant to 28 U.S.C. § 1292(a)(1).

The Third Circuit rejected Gardner's argument, stating that denial of class certification does not constitute the absolute refusal of an injunction and that no immediate or irreparable consequences flow from a

postponement of review. (App. A, infra at 5a - 10a)[2]

Gardner's timely Petition for Rehearing was denied on July 22, 1977.[3]

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' Dismissal of Gardner's Appeal Conflicts With the Holdings of the Majority of Courts of Appeals.

This Court should grant the instant Petition because the Court of Appeals has decided an important question of federal law in a manner which conflicts with the holdings of the majority of courts of appeal which have considered the application of § 28 U.S.C. § 1292(a)(1) to interlocutory appeals of disctrict court orders refusing to grant class action certification in civil rights cases.

The Act of June 25, 1948, c. 646, 62 Stat. 929, 28

2. Chief Judge Seitz filed a concurring opinion, in which he determined that should Gardner obtain all of the individual relief she seeks, she would still have standing to appeal the class action denial following final judgment. (App. A. infra at 10a - 21a)

3. Judge Gibbons joined by Judge Adams strongly dissented from the Third Circuit's denial of Gardner's Petition for Rehearing. (App. B, infra at 24a - 33a)

U.S.C. § 1292(a)(1), upon which Gardner grounded her right to appeallate review, provides as follows:

> "§ 1292. Interlocutory decisions
> (a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving, injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court. . ."

a. The Third Circuit's Decision

While recognizing the significance of the class action determinination for the subsequent course of the litigation and acknowledging the class representative's interest in early appellate review, the Third Circuit nonetheless held that a class certificstion decision, unlike a decision on an application for an injunction, is:

> ". . . wholly procedural. It is normally within the discretion of the trial court; [citation omitted] it may be conditional, subject to alteration or amendment prior to final judgment, F.R. Civ. P. 23(c)(1); and it does not implicate the merits of the case at all. If, after judgment on the merits, the relief granted is deemed unsatisfactory, the question of class status is fully reviewable. The delay

involved is the same delay that accompanies review of all interlocutory procedural rulings in a case, and the delay in no way diminishes the power of the court upon review to afford full relief.

"We perceive no irremediable consequences flowing from a postponement of review."

* * * * *

"We understand the conceptual basis of the theory advanced by Ms. Gardner. She argues that the ultimate injunctive relief in a successful action may be narrower if class status is denied than if class status were granted. But this effect will occur, if at all, only after a decision on the mertis of the prayer for injunctive relief. Prior to that time, an order denying a class certification does not 'touch on the merits of the claim' nor does it have 'final and irreparable effects on the rights of the parties' . . ." (App. A at 6a - 7a, 9a)[4]

4. In so holding, the Third Circuit clearly stated that it was deliberately closing an avenue of appeal that had heretofore been available by virtue of Hackett v. General Host Corp., 455 F.2d 618 (3rd Cir. 1972):

> "Secondly, Eisen is not needed to afford interlocutory appellate review in those cases in which the refusal to grant class action designation amounts to a denial of apreliminary injunction broader than would be appropriate for individual relief. 28 U.S.C. § 1292(a)(1) [citations omitted] This category of interlocutory appeals is adequate, we think, to protect against most district court inhospitability to class action litigation involving civil rights. . . ." Id., at 622.

b. Conflicting Decisions in Other Circuits

The Third Circuit recognized that its decision conflicted with the decisions of other circuits on the question of the immediate reviewability of class action denials. In so holding, the Third Circuit expressly allied itself with the Second and the District of Columbia Circuits, which have rejected the proposition that a class action determination is appealable pursuant to 28 U.S.C. § 1292(a)(1). Williams v. Wallace Silversmiths, Inc., ___ F.2d ___, 13 E.P.D. ¶ 11,556 (2nd Cir. 1977); City of New York v. International Pipe and Ceramics Corp., 410 F.2d 295 (2nd Cir. 1969); Williams v. Mumford, 511 F.2d 363 (D.C. Cir. 1975), cert. denied, 423 U.S. 828 (1975).

The First, Fourth, Fifth, Seventh and Ninth Circuits have held that orders refusing to certify class actions are appealable under 28 U.S.C. § 1292(a)(1), in cases where broad injunctive relief is sought against violations of rights guaranteed by Title VII of the Civil Rights Act of 1964 or by the Constitution of the United States of America. Yaffee v. Powers, 454 F.2d 1362 (1st Cir. 1972); Brunson v. Board of Trustees of School District No. 1, 311 F.2d 107 (4th Cir. 1963); cert. denied, 373U.S. 933 (1963); Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975); Jenkins v. Blue Cross Mutual Hospital Insurance, Inc., 522F.2d 1235 (7th Cir. 1975); Price v. Lucky Stores, 501 F.2d 1177 (9th

Cir. 1974); Inmates of San Diego County Jail v. Duffy, 528 F.2d 954 (9th Cir. 1975).[5]

The theory which emerges from the above cases is that where "the substantial effect" of the court's order denying class action status "is to narrow considerably the scope of any possible injunctive relief in the event plaintiffs ultimately prevail on the merits . . . the order is appealable as a denial of the broad injunctive relief sought." Yaffee v. Powers, supra, at 1364-1365.[6]

5. Although they did not directly involve class action certification orders, the following cases permitted appeals from orders which effectively limit injunctive relief: Melendez v. Singer Friden Corp., 529 F.2d 321 (10th Cir. 1976); Abercrombie and Fitch Co. v. Hunting World, Inc. 461 F.2d 1040 (2nd Cir. 1972); Build of Buffalo v. Sedita, 441 F.2d 284 (2nd Cir. 1971); Spangler v. U.S., 415 F.2d 1242 (9th Cir. 1967). See, generally, Comment, Appealability of Class Action Determinations, 44 Ford. L. Rev. 548 (1975);Note, Interlocutory Appeal From Orders Striking Class Allegations, 70 Colum. L. Rev. 1292 (1970)

The Seventh Circuit has sanctioned an appeal from an order granting class certification, where a preliminary injunction is requested and the class action decision controls the scope of relief thus obtained. Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976).

6. The Eighth Circuit has expressly refused to adopt or reject this theory of appealability for class action orders. Johnson v. Nekoosa - Edwards Paper Co., ____ F.2d ____, 14 F.E.P. Cases 1658 (8th Cir. 1977); Donaldson v. Pillsbury Co., 529 F.2d 979 (8th Cir. 1976)

The Fourth Circuit has delineated the conditions under which a denial of a class action will be appealable under 28 U.S.C. § 1292(a)(1), i.e., where the "class action bears a symbiotic relationship to the frustration of relief. . ." Jones v. Diamond, supra, at 1095:

> "The first, and perhaps obvious requirement is that the plaintiff's prayer for an injunction must constitute the heart of the relief he seeks. The desired injunction must be capable of resolving the substantive issues of the claim, it cannot merely maintain the status quo during the litigation. . ." [citations omitted]
>
> "The second requirement for appealability is that the practical result of the order denying the proposed class must be to deny the requested broad injunction . . . .We therefore hold that where the denial of permission to proceed as a class is synonymous with the denial of the broad injunctive relief sought on the merits, and where the injunction is the primary purpose of the suit, the order is appealable under § 1292(a)(1) as an order 'refusing' an injunction." Id., at 1095-1097 (emphasis added).[7]

7. While Jones v. Diamond, supra was a case where both a preliminary and a permanent injunction was sought, the absence of the request for a preliminary injunction here does not affect appealability. Indeed, in Rodgers v. United States Steel Corp., 541 F.2d 365 (3rd Cir. 1976), the Third Circuit rejected the attempt to use a pro forma preliminary injunction to convert an order not final under 28 U.S.C. § 1291 into one arguably appealable pursuant to 28 U.S.C. § 1292(a)(1)

This Court in Switzerland Cheese Association,

(footnote 7 continued next page)

Reasons for Granting the Writ

7. (Continued)

Inc. v. E. Hornes' Market, Inc., 385 U.S. 23 (1966) declined to hold that an interlocutory order did not include an order denying a permanent injunction. Citing Switzerland Cheese, the United States Court of Appeals for the Fifth Circuit held that an order denying a permanent injunction was appealable pursuant to 28 U.S.C. § 1292(a)(1). Equal Employment Opportunity Commission v. International Longshoreman's Association, 511 F.2d 273 (5th Cir. 1975), cert. denied, 423 U.S. 994 (1975)

Further, Yaffee v. Powers, supra; Price v. Lucky Stores, supra; and Brunson v. Board of Trustees of School District No. 1, supra, held class action denials to be appealable where only permanent injunctive relief was requested.

Reasons for Granting the Writ

c. The District Court Decision Effectively Denied the Broad Injunctive Relief Sought

Thus, it is clear that there is substantial disagreement with the basic premise of the Third Circuit's decision; that the denial of class action certification does not diminish the power of a court to afford full relief at a later stage in the proceedings. As Gardner's complaint makes clear, the heart of the relief she seeks is a broad injunction, curtailing all of Westinghouse's policies and actions which adversely affect females. Such an injunction would resolve the substantive issues presented by her claim of a pervasive pattern of sex discrimination which permeates all of Westinghouse's employment practices. Jones v. Diamond, supra. However, the District Court's refusal to grant class action status effectively and finally precludes Gardner from obtaining the broad remedy requested. Left only with her individual action, Gardner will be limited at the trial on the merits to presenting evidence of employment practices which affected her personally. Consequently, she will only be able to obtain relief tailored to her individual complaint: Westinghouse's failure to hire her. See, Brunson v. Board of Trustees of School District No. 1, supra. The district court's denial of the Motion to Compel Discovery, which resulted from the adverse ruling on the Motion to Determine a Class Action, is further proof that Gardner will be precluded from

gathering or presenting at trial any evidence concerning Westinghouse's employment practices at its facilities outside of the Pittsburgh area. Obviously, no injunctive remedy could be granted which would curtail Westinghouse's claimed system-wide discrimination. The district court's order is not conditional, and totally forecloses the possibility that absent class members, especially those employed outside of the Pittsburgh area, can obtain any relief whatsoever.

Gardner is not litigating a company-wide policy, such as a "no-marriage" rule where an injunction in favor of the named plaintiff will perforce operate to the benefit of all employees. See e.g., Sprogis v. United Airlines, Inc. 444 F.2d 1194 (7th Cir. 1974). Rather, this case falls within the rule established by Nance v. Union Carbide Corp., 540 F.2d 718 (4th Cir. 1976) and Danner v. Phillips Petroleum Co., 447 F.2d 159 (5th Cir. 1971), that absent compliance with the requirements of Fed. R. Civ. P. 23 and certification thereunder, class-wide relief cannot be obtained. Nance and Danner demonstrate that the Third Circuit's assumption that Gardner could, after the trial on the merits of her individual case, still obtain all of the relief detailed in the complaint is erroneous.

d. Immediate Irreparable Consequences Flow From the Denial of Class Status

Although the Third Circuit found that no immediate, irreparable consequences result from the postponement of review of class action orders, the narrowing of the permanent injunctive relief which can be obtained by Gardner is but one example of the consequences attendant upon and the refusal to grant class status. District Court inhospitability to class actions, particularly in civil rights cases, is exacerbated by the non-reviewability of denials of class certification until after the individual case on the merits has been concluded, which may be months or even years after an erroneous order is issued. To allow such orders to stand as precedent, unreviewed by an appellate court, until the conclusion of the case on the merits has an undoubted chilling effect on the class action device and on civil rights cases generally. Williams v. Mumford, supra, (Opinion of Judge Spottswood W. Robinson on application for rehearing before the court en banc, 511 F.2d at 371-372)[8]

As is indicated by Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975), the effect of class action denials on the further conduct of the case is immediate

8. Judge Gibbons expressed much the same sentiments in his dissent from the denial of the Petition for Rehearing in this case. (See App. B, at 25a,32a , infra.)

and irreparable. The scope of discovery and of evidence at trial is determined by whether or not the case proceeds as a class action. Class action denial ultimately leads as it did in the case at bar, to a narrowing of discovery and to a focus at trial on the merits solely with the individual's claim.

The case focus shifts to an unwavering concern with the named plaintiff's individual claim. If the appealability of orders refusing to certify a class action must await the conclusion of the trial of the individual plaintiff's claims on the merits, undue delay and waste of the time of both judge and counsel will result. If the class action denial is reversed on appeal, the case will have to be retried, following an additional period of time for discovery. Such was the result in Rich v. Martin Marietta, supra, a result which contravenes the principles underlying Fed. R. Civ. P. 23.

The denial of a motion to determine a class action in an employment discrimination case where a broad injunction is sought has the immediate effect of narrowing the relief which can ultimately be obtained by the named plaintiff. The majority of circuits within the federal appellate system have recognized the irreparable harm resulting thereby, and have held such orders appealable pursuant to 28 U.S.C. § 1292(a)(1). The question of the

interlocutory appealability of class action determinations is of the utmost importance to all litigants involved in class actions, and particularly to those litigants seeking to certify class actions in civil rights cases. Since the circuits are divided on this issue, this Court should resolve the conflict. It is, therefore, both appropriate and necessary that this Court grant the instant Petition for Writ of Certiorari.

2. The Third Circuit's Interpretation of 28 U.S.C. § 1292(a)(1) Conflicts With the Prior Holdings of This Court.

This Court should grant the instant Petition because the Court of Appeals misapplied this Court's decision in Switzerland Cheese, Inc. v. E. Hornes' Market, Inc., 385 U.S. 23 (1966) and Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 249 (1955).[9]

The Third Circuit erred in its conclusion that the denial of a class action does not amount to the denial of

9. While not mentioned in the Third Circuit's opinion, Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188 (1942); Enelow v. New York Life Insurance Co., 293 U.S. 379 (1935); and General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430 (1932) support Gardner's position herein.

Reasons for Granting the Writ

an injunction, a conclusion which rested on its view of Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., 385 U.S. 23 (1966). This Court therein held that the denial of a motion for summary judgment in a case where injunctive relief, both temporary and permanent, was sought, was strictly a procedural pre-trial order which did not settle or tentatively decide anything about the merits of the claim. Id. at 25. Clearly, however, the order denying class action status herein is not merely a pre-trial order that advances the case to trial.[10] The order definitely narrows the scope of relief which Gardner can ultimately obtain; and thus effectively denies the broad permanent injunction which is the heart of the relief requested in order to resolve the substantive issues of the case.

In Baltimore Contractors, Inc., this Court analyzed the legislative history of 28 U.S.C. § 1292(a)(1) as follows:

> "No discussion of the underlying reasons for modifying the rule of finality appears in the legislative history, although the changes seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequence." Id., at 181.

10. As the First Circuit noted in Lamphere v. Brown University, 553 F.2d 714 (1st Cir. 1977) decisions on class certification often implicate the merits of the underlying substantive claims.

Reasons for Granting the Writ

The order refusing to certify the class herein unmistakably is an interlocutory order of serious, irreparable consequence. As this Court has recently indicated in East Texas Motor Freight System Inc. v. Rodriguez, ____ U.S. ____, 97 S. Ct. 1891 (1977), the representative plaintiff must be a member of the class he or she seeks to represent at the time the class is certified. Where, as here, a class action is formally denied by the district court, and the individual plaintiff loses his or her individual case on the merits, this Court's ruling in East Texas Motor Freight System, Inc. suggests that no class could be subsequently certified, at least by the original class representative, despite the reversal of a wholly erroneous district court decision on the maintainability of the case as a class action.

Indeed, it is probable that an appeal challenging the merits of a district court order denying class certification brought by a class representative following the loss of his or her individual case would be dismissed, as not presenting the appellate court with a concrete case or controversy, in violation of Article III of the Constitution of the United States. See, East Texas Motor Freight System, Inc. v. Rodriguez, supra; Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), Sosna v. Iowa, 419 U.S. 393 (1975), Board of School Commissioners of the City of Indianapolis

v. Jacob, 420 U.S. 128 (1975).[11]

Moreover, this Court's recent decision in United Airlines v. McDonald, ____ U.S. ____ 97 S. Ct. 2464 (1977) suggests that the statute of limitations will run against the individual Title VII claims of putative class members, when class status is denied by the district court and affirmed on appeal after an intervening trial on the merits.[12] The limited tolling of the statute of limitations for putative class members allowed in United Airlines, Inc. is for the purpose of allowing them to intervene for the purpose of obtaining review over the lower court's allegedly improper class action decision only. Thus this Court's holding in American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974) still prevents members of the

11. At least one appellate court has refused to allow an appeal to correct errors in class certification after the representative plaintiff's claim became moot. Napier v. Gertrude, 542 F.2d 825 (8th Cir. 1976); Contra, Satterwhite v. City of Greenville, Texas, ____ F.2d ____, 14 E.P.D. ¶7773 (5th Cir. 1977) which contravenes this Court's decision in East Texas Motor Freight System, Inc.

12. This Court noted that the denial of class action certification in United Airlines, Inc. could not be appealed as of right in the Seventh Circuit. Id., 97 S. Ct. at 2467 n.4. However, the plaintiffs therein did not attempt to invoke 28 U.S.C. § 1292(a)(1). See, Jenkins v. Blue Cross Mutual Hospital Insurance, Inc., supra.

Gardner class from instituting individual suits to litigate their individual claims at the conclusion of Gardner's appeal on the merits of the denial of her individual case.

Even if the individual class members' rights to present their Title VII claims can be said to be held in abeyance until the conclusion of all of the appeals which Gardner can take as an individual, ignorance of the action and failure to exhaust administrative remedies will result in the loss of many potential claims. Clearly, the member of a class action under Title VII need not exhaust his or her administrative remedies, but the class representative or plaintiff in an individual action clearly must do so prior to maintaining a lawsuit. Oatis v. Crown Zellerbach Corp., 398 F. 2d 496 (5th Cir. 1968).

The above serious and irreparable consequences of an order denying class certification can only be avoided by immediate appealability pursuant to 28 U.S.C. § 1292(a)(1).

Gardner respectfully submits that the Third Circuit's erroneous analysis of 28 U.S.C. § 1292(a)(1) and of the holdings of this Court require the granting of the instant Petition.

Conclusion

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE
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No. _____

October Term, 1977

JO ANN EVANS GARDNER,

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v.

WESTINGHOUSE BROADCASTING COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 76-1410

JO-ANN EVANS GARDNER

v.

WESTINGHOUSE BROADCASTING COMPANY,

Jo Ann Evans Gardner, on her own behalf as a representative of the class and on behalf of the class that she seeks to represent,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil Action 75-614)

Submitted Under Third Circuit Rule 12(6)

March 28, 1977

Before: SEITZ, *Chief Judge*, and ALDISERT and HUNTER, *Circuit Judges*.

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OPINION OF THE COURT

(Filed June 6, 1977)

ALDISERT, *Circuit Judge.*

The question is whether a denial of a class certification can be immediately appealed under 28 U.S.C. § 1292 (a)(1) [1] on the theory that the denial amounts to the denial of an injunction. The circuits are divided on the question. Although the theory of § 1292(a)(1) appealability has been mentioned in dictum in several opinions in this circuit, especially *Hackett v. General Host Corp.*, 455 F.2d 618 (3d Cir. 1972), we have never applied it to permit such an appeal, nor have we ever directly adjudicated its validity. Upon consideration, we believe that the theory is unworkable as an exception to the general rule in this circuit limiting the appealability of class determinations and that it is unwarranted in its expansion of the narrow purposes of § 1292(a)(1). Accordingly, we reject the theory of § 1292(a)(1) appealability and grant appellee's motion to dismiss the appeal.

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1. § *1292. Interlocutory decisions*

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

I.

This civil rights action was commenced by the plaintiff, Jo Ann Evans Gardner, on her own behalf and on behalf of a class of similarly situated women alleging sex discrimination in the employment practices of the defendant, Westinghouse Broadcasting Company. The complaint sought injunctive and monetary relief, and attorney's fees. Shortly after commencing the action, Ms. Gardner moved for a class certification under F.R. Civ. P. 23(b)(2). Interrogatories were served. After Westinghouse failed to respond fully to certain interrogatories, Ms. Gardner moved to compel discovery. After oral argument, the district court denied both motions, ruling that there were no questions of law or fact common to the class, that plaintiff's claim was not typical, and that there was no need to consider the discovery motion in light of the denial of class status. No further rulings were made. Without obtaining a certificate under 28 U.S.C. § 1292(b),[2] Ms. Gardner filed an appeal from the denial of her class action motion asserting 28 U.S.C. § 1292(a)(1) as the jurisdictional predicate. Westinghouse moved to dismiss the appeal for lack of jurisdiction. That motion has been referred to this panel and is now before us.

II.

Ms. Gardner places primary reliance on the dictum in *Hackett v. General Host Corp.*, 455 F.2d 618, 622 (3d Cir.

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2. § *1292. Interlocutory decisions*

. . .

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

1972), which suggested that interlocutory review of a class denial might be had under § 1292(a)(1) "in those cases in which the refusal to grant class action designation amounts to a denial of a preliminary injunction broader than would be appropriate for individual relief." That suggestion was repeated in *Samuel v. University of Pittsburgh,* 506 F.2d 355, 358 n.6 (3d Cir. 1974), in *Rodgers v. United States Steel Corp.,* 508 F.2d 152, 160 (3d Cir. 1975), and again in a later aspect of the same case, *Rodgers v. United States Steel Corp.,* 541 F.2d 365, 372-73 (3d Cir. 1976). In none of these cases was the suggestion found to be applicable. In *Hackett* itself, interlocutory review of a class determination was refused. Thus, though it has not been expressly rejected in this circuit, neither has the *Hackett* suggestion ever been applied. This case directly presents the issue whether such an interpretation of § 1292(a)(1) can be squared either with the strong and consistent policy in this circuit of discouraging piecemeal appellate review, or with the special and narrow purposes of § 1292(a)(1).

A.

Following Judge Gibbons' seminal opinion in *Hackett,* this court, *in banc,* and again speaking through Judge Gibbons, enunciated what has become the core principle of class determination appealability in this circuit. "A class action determination, affirmative or negative, is not in this circuit a final order appealable under 28 U.S.C. § 1291. . . . [I]f there is any route open for the interlocutory review of a grant of class action treatment under rule 23(b)(3) in this circuit, it is only pursuant to 28 U.S.C. § 1292(b)." *Katz v. Carte Blanche Corp.,* 496 F.2d 747, 752 (3d Cir. 1974). *Katz* adjudicated the particular issue of a class certification granted under F.R. Civ. P. 23(b)(3). In other applications, however, the *Katz* principle has not been so limited. The requirement of a § 1292(b) certificate as a prerequisite to considering the case for interlocutory review has been applied neutrally to denials as well as

grants of class status and it has been applied to classes sought under rule 23(b)(2) as well as rule 23(b)(3).[3]

Our policy on this question derives, in part, from a balancing of "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson v. Petroleum Conversion Corp.,* 338 U.S. 507, 511 (1950). We do not deny the importance of the class determination in many cases. Indeed, we have recently recognized that "class action determination has significant, practical effects on the litigation and an aggrieved party may have a very real interest in securing early appellate review." *Link v. Mercedes-Benz,* — F.2d — , — (3d Cir. 1976) (*in banc*) (plurality opinion). But the possible effects of a ruling are not determinative of whether it can be immediately appealed. Evidentiary rulings, for example, can be critically important but they are not the proper subject of an interlocutory appeal. The question is whether the *delay* in review will work an injustice. In the case of an application for an injunction, especially a preliminary injunction, the urgency of the matter is obvious. The request for an injunction goes to the merits of the case and delayed review may be the practical equivalent of no review. But a class determination does not partake of the same urgency. A decision on class status is wholly procedural. It is normally within the discretion of the trial court, *see Link v. Mercedes-Benz, supra,* — F.2d at — ; it may be conditional, subject to alteration or amendment prior to final judgment, F.R. Civ. P. 23(c)(1); and it does not implicate the merits of the case at all. If, after judgment on the merits, the relief granted is deemed unsatisfactory, the question of class status is fully reviewable. The delay involved is the same delay that accompanies review of all interlocutory procedural rulings in a case, and the delay in no way

3. *Link v. Mercedes-Benz,* — F.2d — (3d Cir. 1976); *Kramer v. Scientific Control Corp.,* 534 F.2d 1085 (3d Cir. 1976); *Ungar v. Dunkin' Donuts,* 531 F.2d 1211 (3d Cir. 1976); *Rodgers v. United States Steel Corp.,* 508 F.2d 152 (3d Cir. 1975); *Samuel v. University of Pittsburgh, supra; Hackett v. General Host Corp., supra.*

diminishes the power of the court upon review to afford full relief.

We perceive no irremediable consequences flowing from a postponement of review. At the same time, we do envision, in the rule here contended for, a sure and quick evisceration of our general policy against interlocutory review of class determinations. The adoption of the rule would not discourage attempts at interlocutory review, it would encourage them. Obviously, a prayer for an injunction can easily be added in most, if not all, purported class actions. Moreover, if we accepted the proposition that a refusal of class status could amount to a denial of an injunction, there is no reason why it could not also be argued that a grant of class status could amount to a grant of an injunction under § 1292(a)(1). *See Illinois Migrant Council v. Pilliod,* 540 F.2d 1062, 1072 (7th Cir. 1976). That, at least, would be a neutral application of the concept. It is true that, under the precise dictum of *Hackett,* not every refusal of a class is appealable. The refusal must "amount to" a denial of an injunction. But we would face in each case the question whether the particular refusal did or did not amount to the denial of an injunction. We would be faced with piecemeal review of that issue and the general rule of § 1291 and *Katz* would be effectively swallowed up by the § 1292(a)(1) exception.

B.

The purposes of § 1292 are narrow. The statute recognizes the necessity "to permit litigants to effectively challenge interlocutory orders of serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176, 181 (1955). The statute, however, does not leave the courts free to decide which interlocutory orders are appealable. It sets forth the exceptional orders specifically.[4]

4. In addition to the exception for orders relating to injunctions, § 1292 sets forth four other specific and precise exceptions to the final judgment rule:

The exception for orders relating to injunctions, understandably, has been the subject of litigation before. In *Morgenstern Chemical Co. v. Schering Corp.,* 181 F.2d 160, 162 (3d Cir. 1950), it was argued that a denial of summary judgment amounted to a denial of an injunction where the complaint sought injunctive relief. Speaking through Judge Hastie, this court rejected the argument:

> [T]he order below lacks the potential of drastic and far reaching effect on the rights of the parties which is characteristic of orders which decide the propriety of granting or refusing injunctions. Such potential supplies the rational basis for the incursion upon the general policy proscribing interlocutory appeals in the exceptional situations covered by § 1292. This view has recently been expressed by the Supreme Court in its statement that § 1292 indicates "the purpose to allow appeals from orders other than final judgments

4. (Cont'd.)

§ 1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

when they have a final and irreparable effect on the rights of the parties." Cohen v. Beneficial Indus. Loan Corp., 1949, 337 U.S. 541, 545, 69 S. Ct. 1221, 1225. Similarly, in this circuit we have said, "The manifest purpose of the statute is to enable a litigant to seek prompt review in an appellate court from an order or decree which in most instances is effective upon its rendition and is drastic and far reaching in effect." Maxwell v. Enterprise Wall Paper Co., 3 Cir., 1942, 131 F.2d 400, 402. Thus, to construe § 1292 as applicable to the present order would unnecessarily divorce the meaning of the language used from its apparent purpose.

The Supreme Court rejected an identical argument concerning the effect of a denial of summary judgment in *Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966). A denial of a motion for summary judgment, said the Court, "is strictly a pretrial order that decides only one thing—that the case should go to trial." More generally, the Court emphasized that "[o]rders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view 'interlocutory' within the meaning of § 1292(a)(1)." *Id.* at 25.

We understand the conceptual basis of the theory advanced by Ms. Gardner. She argues that the ultimate injunctive relief in a successful action may be narrower if class status is denied than if class status were granted. But this effect will occur, if at all, only after a decision on the merits of the prayer for injunctive relief. Prior to that time, an order denying a class certification does not "touch on the merits of the claim" nor does it have "final and irreparable effect on the rights of the parties." In sum, a class determination, affirmative or negative, lacks the immediate and drastic consequences which attend an injunction and which form the basis for excepting injunctive rulings from the final judgment rule.

We recognize the division of the circuits on this issue. The First, Fourth, Fifth, and Ninth Circuits [5] have accepted the proposition that a class determination, at least in some instances, may be appealed under § 1292(a)(1). The Second and District of Columbia Circuits [6] have rejected that proposition. Today we align ourselves with the latter courts in holding that a class action determination may not be appealed under § 1292(a)(1). The only mode of interlocutory review in this circuit will continue to be pursuant to § 1292(b).

The motion to dismiss the appeal will be granted.

SEITZ, *Chief Judge*, Concurring.

The argument that the denial of class certification amounts to an injunction is that some injunctive relief which might be appropriate in a class action would not be appropriate in an individual suit by the named plaintiff. Thus, it is argued, the decision to refuse certification effectively limits the scope of injunctive relief which might be granted. *See Hackett v. General Host Corp.*, 455 F.2d 618 (3d Cir. 1972). The majority's response to this argument is, at least in part, that the decision not to certify does not foreclose the grant of class-wide injunctive relief because this decision can always be reviewed after final judgment, and the application for class certification and class-wide relief renewed in the district court. Thus, they say "[t]he question is whether the *delay* in review will work an injustice . . . [i]f, after judgment on the merits, the relief granted is deemed unsatisfactory, the question of class

5. *Doctor v. Seaboard Coast Line R.R.*, 540 F.2d 699 (4th Cir. 1976); *Jones v. Diamond*, 519 F.2d 1090 (5th Cir. 1975); *Price v. Lucky Stores, Inc.*, 501 F.2d 1177 (9th Cir. 1974); *Yaffe v. Powers*, 454 F.2d 1362 (1st Cir. 1972); *Spangler v. United States*, 415 F.2d 1242 (9th Cir. 1969); *Brunson v. Board of Trustees*, 311 F.2d 107 (4th Cir. 1962); see *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062 (7th Cir. 1976).

6. *Williams v. Mumford*, 511 F.2d 363 (D.C. Cir. 1975); *City of New York v. International Pipe and Ceramics Corp.*, 410 F.2d 295 (2d Cir. 1969) (semble).

status is fully reviewable. The delay involved is the same delay that accompanies review of all interlocutory procedural rulings in a case, and the delay in no way diminishes the power of the court upon review to afford full relief."

Thus, the majority's analysis depends on its position that the refusal to certify is always reviewable after final judgment. While I believe that this position is correct, it deserves greater explication than the majority has given it.[1]

If the district court should deny Ms. Gardner the individual relief she has sought, she could, of course, raise the district court's failure to certify along with her other assignments of error on appeal after final judgment. But the problem would be different on the eventuality that the district court *grants* her the individual relief she has sought. This contingency poses a question of Article III justiciability, namely, whether Ms. Gardner would have standing to appeal the district court's refusal to certify even though she would no longer have personal relief in the balance. If Ms. Gardner would not have standing to appeal the district court's refusal to certify after she had obtained the individual relief she has requested, the court's refusal to certify *could* have the effect of reducing the ultimate scope of injunctive relief.

The Supreme Court's decisions in *Sosna v. Iowa*, 419 U.S. 393 (1975) and *Board of School Comm'rs v. Jacobs*,

1. Portions of the majority's opinion indicate that, apart from the argument that the certification decision is reviewable after final judgment, the refusal to certify cannot be deemed to constitute the denial of an injunction because this refusal does not directly deny injunctive relief. In view of my conclusion that the certification decision is appealable after final judgment, I need not reach this alternative possible ground of decision. But I note that any argument that an order must directly grant or refuse injunctive relief to be appealable under §1292(a)(1) is not readily reconcilable with *General Electric Co. v. Marvel Rare Metals Corp.*, 287 U.S. 430 (1932), where the Supreme Court sustained the appealability of an order which dismissed a counterclaim for improper venue.

I also note that Ms. Gardner's complaint on behalf of herself and the class does not request temporary injunctive relief. I need not decide whether the disposition of this case should be different if she had. *See Stewart-Warner Corp. v. Westinghouse Electric Corp.*, 325 F.2d 822, 829-30 (Friendly, J., dissenting) (2d Cir. 1963).

420 U.S. 128 (1975) provide some guidance as to whether Ms. Gardner would have standing. *Sosna* involved the constitutionality of Iowa's requirement that a petitioner in a divorce action be a resident of the state for one year prior to the filing of the petition. After the district court had certified the suit as a class action but before the case reached the Supreme Court, the named plaintiff had satisfied the one year residence requirement. The Supreme Court nevertheless held that the suit was justiciable under Article III. "When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant." 419 U.S. at 399. On the other hand, in *Jacobs* the Supreme Court held the case moot when the named plaintiffs had lost their personal interest in the outcome after the district court purported to certify the suit as a class action. The Court stressed that the district court had not properly certified or even identified the class, and had not adequately determined that the criteria of Rule 23 were satisfied.

The general rule which would appear to emerge from *Sosna* and *Jacobs* is that a named plaintiff must have a live personal stake in the suit at the time the class is properly certified. Thereafter, the suit may be entertained without violating Article III even though no named plaintiff has a live personal stake, as long as the class has a continuing interest. The application of this rule here would seem to indicate that the successful individual plaintiff could not appeal the refusal to grant class status after final judgment, since any decision by the district court, on remand from this court, to certify the class would postdate the time when the named plaintiff lost her personal stake—at the time of the original judgment in her favor. But in footnote 11 of its opinion in *Sosna*, the Supreme Court indicated that the apparent general rule is not ironclad:

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes

> moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to "relate back" to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

Footnote 11 of *Sosna* was relied on in *Gerstein v. Pugh,* 420 U.S. 103, 110 at n.11. In *Pugh,* named plaintiffs had been incarcerated without a judicial determination of probable cause. The Supreme Court said that:

> At the time the complaint was filed, the named respondents were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them were still in custody awaiting trial when the District Court certified the class. Such a showing ordinarily would be required to avoid mootness under *Sosna. See Sosna,* supra, at 402 n.11; (citation omitted). The length of pre-trial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is clear. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.

1. *Relation Back Under Footnote 11 of* Sosna.

While footnote 11 does not purport to give an exhaustive description of the circumstances in which certification may be deemed to relate back to the filing of the

complaint, it does not expressly allow relation back in circumstances other than those in which a controversy has such an inherently short cycle that a district court could not be expected to rule on a motion for certification before the named plaintiff's personal stake has expired. But the Court's language has not always been narrowly read.[2] In *Allen v. Likins,* 517 F.2d 532 (8th Cir. 1975), the court indicated that relation back is permissible when the district court has unduly delayed its decision on certification. In *Frost v. Weinberger,* 515 F.2d 57 (2d Cir. 1975), *cert. denied,* 424 U.S. 958 (1976), Judge Friendly said that the "apparent force" of the general rule stated in *Sosna* was "largely drained" by footnote 11. In *Frost,* the widow and two children of a deceased who had been insured under the Social Security Act claimed that the Social Security Administration had deprived them of benefits they deserved without a full evidentiary hearing. After they filed their complaint on behalf of "all persons who now or may in the future be entitled to survivors' benefits under the Act whose benefits have been or may be reduced without a prior hearing," the district court ordered the Secretary of Health Education and Welfare to conduct a full hearing on their claims within a month, and the Secretary did so. Subsequently, the court certified the class. The defendants claimed that the case should be dismissed as moot, because the named plaintiffs had already been given the hearing which they claimed was required by due process when the district court certified the class. In rejecting this argument, Judge Friendly said:

> The reason for generally requiring that the controversy be "live" as to the named plaintiff at the time of the class action designation is that otherwise the court would have no assurance that the named plaintiff will vigorously represent the class. This has little application when, as here, the court has deferred class action determination, with the agreement of all parties,

2. *But cf. Napier v. Gertrude,* 542 F.2d 825 (10th Cir. 1976).

pending a ruling on the merits. The Government has pointed to no respect in which this case would have proceeded differently if the court had certified this as a class action on November 16, 1973, rather than in its decision of May 3, 1974. If as Mr. Justice White said with some justification in his dissent in *Sosna,* 419 U.S. at 412 (footnote omitted), "The only specific, identifiable individual with an evident continuing interest in presenting an attack upon the residency requirement is appellant's counsel" and, if the Court had overcome this by a "legal fiction" consisting of "the reification of an abstract entity, 'the class', constituted of faceless, unnamed individuals who are deemed to have a live case or controversy against appellees," it scarcely can be consequential in a case like this whether the named plaintiff had obtained a hearing in the period which, with the agreement of the parties, the court took to make its class action determination. 515 F.2d at 64.

To the extent that the Supreme Court's opinion in *Sosna* relies upon legal fictions, I agree with Judge Friendly that it cannot be deemed to identify the real considerations which must guide any determination of whether a case is justiciable under Article III. While the Court's determination that class certification brings new interests before the court does not appear to involve a legal fiction, the device of relation back clearly does, and thus it is important to identify the real considerations which motivate the use of this device.

The Supreme Court's apparent concern is that if the named plaintiff's stake expired before the class was certified and thus "acquired a legal status separate from the interest asserted by [named plaintiff]," there would be a hiatus in which there would be no live interests before the court. Use of the relation back device may alleviate this concern by recasting the facts so that the interests of the class are deemed to have been presented to the court at a time when the named plaintiff had a live stake.

But the concern that there might be an interval in which no live interests are before the court is not, in my opinion, a compelling one. In the first place, the fact of the matter is that in any case—such as *Pugh*—in which the device of relation back is used there will have been such an interval. It is true that footnote 11 of *Sosna* does not explicitly allow extension of the relation back device to cases other than those where the controversy tends to dissipate before class certification can be expected, and that the footnote states that the applicability of relation back "may depend . . . especially [upon] the reality of the claim that otherwise the issue would evade review." But it would appear that to the extent the "capable of repetition, yet evading review" criterion would be relevant to justiciability, it would bear on the "discretionary decision whether to reach the merits of an issue, rather than [the] Art. III 'case or controversy' requirement." *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 781 (Powell, J., concurring in part and dissenting in part).

In some circumstances, the "capable of repetition, yet evading review" criterion *is* relevant to whether Article III has been satisfied. In *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975), the Court said:

> *Sosna* decided that in the absence of a class action, the "capable of repetition, yet evading review" doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. The instant case, not a class action, clearly does not satisfy the latter element.

In the context of *Bradford,* the fact that the same complaining party might reasonably be expected to be subjected to the same action again is undoubtedly relevant to

whether Article III is satisfied. If an individual plaintiff can show that there is "a reasonable expectation that [he will] be subjected to the same action again," he can show that he continues to have a personal interest in the outcome of the case, despite apparent mootness. On the other hand, if he cannot show that the question is "capable of repetition" as to himself, he will fail to show that he continues to have a personal interest in the outcome of the case. Thus, my reading of *Bradford* indicates that the doctrine of "capable of repetition, yet evading review," when it bears upon Article III, is a way of demonstrating that the constitutional requirement of "case or controversy" is really met, despite apparent mootness. The doctrine does not function to provide an *exception* to the constitutional requirement. In fact, it would seem improper to make an exception to the requirements set forth in the broad language of Article III.[3]

On the other hand, there are circumstances in which the doctrine of "capable of repetition, yet evading review" goes to the "discretionary decision to reach the merits of an issue, rather than [the] Art. III 'case or controversy' requirement." In *Sosna*, the Supreme Court mentioned that one factor weighing in favor of justiciability was that Iowa's one year residence requirement for filing a divorce was so short that it tended to evade review. But in *Franks v. Bowman Transp. Co., supra*, the Court said: "nothing in our *Sosna* or [*Jacobs*] opinions holds or even intimates that the fact that the named plaintiff no longer has a personal stake in the outcome of a certified class action renders the class action moot unless there remains an issue 'capable of repetition, yet evading review.' " (citation omitted) 424 U.S. at 754. Rather, the Court felt that the "capable of repetition, yet evading review" criterion went to the discretionary component of justiciability, and that Article III was satisfied solely because the interests of the class were before the court.

3. In *United States v. Richardson*, 418 U.S. 166, 179-80 (1974), the Court indicated that standing is not conferred by virtue of the fact that "if respondent is not permitted to litigate this issue, no one can do so."

With respect to relation back, it would seem that the doctrine of "capable of repetition, yet evading review" would only be relevant to any constitutional requirement that there *always* be live interests before the court if the doctrine is a way of demonstrating that such a constitutional requirement is in fact satisfied even where it might not appear to be. If the doctrine does not serve as a way of showing that there continue to be live interests before the court, then it goes to the discretionary component of justiciability, and the fact that the Supreme Court mentioned the doctrine in footnote 11 of *Sosna* does not imply that there is any constitutional requirement that there be live interests before the court at every moment of a lawsuit.

The fact that a case presents an issue which may well become moot as to the named plaintiff before class certification can be expected does not imply that during the interval between mootness with respect to the named plaintiff and class certification there continue to be live interests before the court.[4] Thus, the fact that footnote 11 of *Sosna* mentions the question of whether a controversy tends to dissipate before class certification does not imply that there is a constitutional requirement that there be live interests before the court at every moment of a lawsuit. In fact, since footnote 11 allows relation back and since the evading review consideration does not speak to Article III, it would seem that footnote 11 implies that there is *no* constitutional requirement that there be live interests before the court at every moment of a lawsuit.

I find any argument that there should be such a requirement unconvincing. There is no reason why holding a case in abeyance until live interests come before the court should mean that the case will not go forward with the necessary concreteness and adverseness. *See Flast v. Cohen*, 392 U.S. 83, 99 (1968). I would view any conten-

4. In *Gerstein v. Pugh*, 420 U.S. at 110-11 n.11, the Court appeared to look to whether the issue was capable of repetition as to the class members, not as to the named plaintiffs.

tion that a court must at all times have a live plaintiff before it and cannot consider adding new interests to repair any deficiency as barren of reality. This is not to say that the class may be certified at any time, but merely that Article III does not divest courts of all discretion to consider adding new parties—even after final judgment—after it appears that former parties have lost their personal stake.[5]

Moreover, as to the discretionary component of justiciability, I believe that this court should entertain an appeal from the district court's refusal to certify the class by a named plaintiff who has received all the individual relief she has requested, at least when the named plaintiff made a timely motion for class certification in the original proceedings. The contrary position would insulate from appellate review a decision of far reaching consequences,[6] and might frustrate the interests of judicial economy since it would encourage a multiplicity of lawsuits in conditions where a class action would be the preferable mode of adjudication.

In sum, I conclude that footnote 11 in *Sosna* should be given an expansive reading, so that Ms. Gardner, even if she obtains all the individual relief she has requested, would have standing to seek reversal of the district court's decision not to certify.

2. *The Named Plaintiff's Continuing Interest.*

The relation back device found in footnote 11 of *Sosna* rests on the theory that upon certification, the interests of the *class* are before the court. But even apart from my conclusion that footnote 11 poses no barrier to, and impliedly permits certification after the named plaintiff's claim is already moot, I believe that the successful named plaintiff could complain of the district court's failure to certify the class because he has the continued *personal* interest of exercising his fiduciary responsibilities with respect to the members of the class he has sought to represent.

5. I agree with *Napier v. Gertrude, supra* n.2, that the fact that the Supreme Court in *Jacobs* did not remand for proper application of F.R. Civ. P. 23 does not weigh against my position, since "[t]he Court did not rule . . . that mootness removed its power to remand, and it does not appear that the failure to certify the class action was assigned as error . . ." 542 F.2d 825, 827.

6. Even if we should hold that the district court's refusal to certify in *this* case may be brought up on an interlocutory appeal because it cannot be reviewed after final judgment, there would still be cases which could not be appealed under §1292(a)(1) because the complaint does not seek injunctive relief. *See Hackett v. General Host Corp.*, 455 F.2d 618 (3d Cir. 1972).

The Supreme Court has apparently never expressed, or been asked to express, any view on the theory that the putative named plaintiff of a class action has a personal interest which stems from the fact that he is a fiduciary with respect to the members of the class. But there are several indicia of the fact that filing an action with a request for class treatment imposes a fiduciary responsibility upon the putative named plaintiff: 1) even before class certification, the action may not be settled or dismissed without court approval,[7] *Kahan v. Rosenstiel*, 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970), 2) F.R. Civ. P. 23(a)(4) requires as a prerequisite for certification that "the representative parties will fairly and adequately protect the interests of the class", 3) F.R. Civ. P. 23(d)(2) gives the court power to issue orders "requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action," *see Knuth v. Erie-Crawford Dairy Coop. Assoc.*, 395 F.2d 420 (3d Cir. 1968). The fiduciary responsibility of representative parties also,

7. In determining that Article III does not always require that a named plaintiff's personal stake continue throughout the litigation, *Sosna*, 419 U.S. 393, 399 at n.8 mentioned that "Once the suit is certified as a class action, it may not be settled or dismissed without the approval of the court."

in my view, explains why class representatives may ever raise matters bearing on the interests of class members even though they have no tangible personal interest in these matters—including the very question of class certification.

I conclude that whether on the relation back theory found in footnote 11 of *Sosna,* or on the theory that Ms. Gardner has a continuing personal stake stemming from the fact that she is a fiduciary on behalf of the putative class, she would be able to appeal the district court's refusal to certify after final judgment even though she receives all the individual relief which she has requested. Since the district court's refusal to certify will always be appealable after final judgment, it can hardly be said that the court's decision has foreclosed the possibility that the class could ultimately be certified and class-wide relief granted. Thus, the court's refusal does not amount to an injunction for purposes of § 1292(a)(1), and the present interlocutory appeal must be dismissed.

APPENDIX B

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 76-1410

JO-ANN EVANS GARDNER

v.

WESTINGHOUSE BROADCASTING COMPANY,

Jo Ann Evans Gardner, on her own behalf as a representative of the class and on behalf of the class that she seeks to represent,

Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and ALDISERT, ADAMS, GIBBONS, HUNTER and GARTH, Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Aldisert
Judge

Dated: July 22, 1977

*Judges Rosenn and Weis did not participate in the consideration of this matter.

UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 76-1410

JO-ANN EVANS GARDNER

v.

WESTINGHOUSE BROADCASTING COMPANY,

Jo Ann Evans Gardner, on her own behalf as a representative of the class and on behalf of the class that she seeks to represent,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

OPINION SUR DENIAL OF PETITION FOR REHEARING

(Filed July 22, 1977)

GIBBONS, Circuit Judge, dissenting

I dissent from the denial of appellant's petition for rehearing in banc. That petition presents an issue which meets every criterion for in banc reconsideration far more than most cases that this court has recently so considered.

See Fed. R. App. P. 35(a); Walton v. Eaton Corp., Civ. No. 76-1707 (3d Cir. filed July 18, 1977) (Gibbons, J., dissenting). Moreover, the panel opinion, in a case in which it was not even necessary to reach the question, has announced a broad prohibition against reviewability of pendente lite denials of class action injunctive relief in civil rights cases. Such a prohibition is inconsistent with the prior law of this circuit, inconsistent with the better reasoned decisions in other circuits,[1] and unsound except as an indication of hostility to the underlying rights being asserted. In that unarticulated hostility, of course, lies the explanation for the decision.

As Judge Aldisert's opinion for the panel majority acknowledges, the seminal opinion in this circuit on the reviewability of class action determinations is Hackett v. General Host Corp., 455 F. 2d 618 (3d Cir. 1972), cert. denied, 407 U.S. 925 (1972), in which we declined to adopt the so-called "death knell" rule of the Second Circuit, that an order denying a motion to permit a case to proceed as a class action may be reviewable as a collaterally final order within the meaning of 28 U.S.C. § 1291 and Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). But while Hackett declined to treat a negative class action determination as a final order it carefully preserved the

1. See Note 2 infra.

right to seek appellate review under 28 U.S.C. § 1292(a)(1) where the denial of class certification amounts to the denial of preliminary injunctive relief. In Hackett, we specifically referred to

> ". . . those cases in which the refusal to grant class action designation amounts to a denial of a preliminary injuction broader than would be appropriate for individual relief. 28 U.S.C. § 1292(a)(1). See, e.g., Oatis v. Crown Zellerback Corp., 398 F.2d 496 (5th Cir. 1968); Shapiro, Bernstein & Co. v. Continental Record Co., 386 F.2d 426 (2d Cir. 1967); Brunson v. Board of Trustees, 311 F.2d 107 (4th Cir. 1962). This category of interlocutory appeals is adequate, we think, to protect against most district court inhospitability to class action litigation involving civil rights, the elective franchise, protection of the environment and the like."

455 F.2d at 622. The point made in Hackett, a point that, in my view at least, was the essential justification for rejecting the Second Circuit's "death knell" rule as announced in Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967), was that in civil rights litigation, injunctive relief in favor of a single plaintiff usually would do nothing whatsoever for the remaining members of the class. A single black child

might be placed in a white school, while all of the child's fellow black classmates were left in a segregated school. In such a case the denial of class action treatment would have the practical effect of denying injuctive relief to the entire class. Moreover, the key issue in such a case, and the key issue in the position taken by the panel majority, is availability of pendente lite injuctive relief. Hackett concluded that we did not need the Eisen interpretation of § 1291 because a denial of pendente lite relief benefiting a class, in the guise of a denial of class action treatement, was reviewable under § 1292(a)(1). Now, without taking the case in banc, a panel majority has overruled the very fundamental premise on which our Hackett holding rests. It has done so, moreover, despite the fact that we reiterated that premise in Rodgers v. United States Steel Corp., 541 F.2d 365, 372-73 (3d Cir. 1976); Rodgers v. United States Steel Corp., 508 F.2d 152, 160 (3d Cir. 1975) and Samuels v. University of Pittsburgh, 506 F.2d 355, 358 n.6 (3d Cir. 1974).

In Hackett we also noted the availability of appellate review, in cases where the denial of class action relief might not amount to the denial of injunctive relief benefiting a class, either under 28 U.S.C. § 1292(b) or under Fed. R. Civ. P. 54(b). A plurality of this court in banc has demonstrated a determination to make the § 1292(b) route a practical impossibility. See Link v.

Mercedes-Benz of North America, Inc., 550 F.2d 860 (3d Cir. 1977) (Gibbons, J., dissenting). The court has also erected a major, useless, and frequently disregarded impediment to the utilization of Rule 54(b). See Allis Chalmers Corp. v. Philadelphia Electric Co., 521 F.2d 360 (3d Cir. 1975). Thus, each of the alternative safeguards upon which we premised the Hackett holding has now been eliminated or substantially eroded.

The panel majority opinion need not have reached out to overrule completely the fundamental premise of the Hackett holding in this case. It could have noted, as Judge Seitz' concurrence does at note 1, that the complaint in this case did not request pendente lite relief in favor of the proposed class. Thus the majority could have restricted its language so as to apply its rejection of § 1292(a)(1) appealability to that situation only, leaving open the possibility of an appeal when the putative class representative did seek pendente lite relief. Instead, in sweeping language, it totally rejects a substantial and well considered body of authorities which recognize the appealability of denials of class certification under § 1292(a)(1) where the denial amounts to a rejection of pendente lite injunctive relief.[2]

2. Doctor v. Seaboard Coast Line R.R., 540 F.2d 699 (4th Cir. 1976); Jones v. Diamond, 519 F.2d 1090 (5th
(footnote 2. continued on next page)

2. (continued)
Cir. 1975); Price v. Lucky Stores, Inc., 501 F.2d 1177 (9th Cir. 1974); Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972); Spangler v. United States, 415 F.2d 1242 (9th Cir. 1969); Brunson v. Board of Trustees, 311 F.2d 107 (4th Cir. 1962); see Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976).

The only explanation we are given in defense of this broad judicial pronoucement is the brief sentence: "We perceive no irremediable consequences flowing from a postponement of review." Majority Op. at ___. That is indeed a faulty perception. If class action pendente lite relief is denied in a voting rights case elections will pass before the case reaches us on final hearing, and class members will have been disenfranchised at those elections. If class action pendente lite relief is denied in a school desegregation case class members will remain for years in segregated classrooms, suffering the permanent psychological effects of inadequate educational opportunities. If class action pendente lite relief is denied in an employment discrimination case years will go by during which class members remain locked in dead end jobs lacking challenge, stimulation, and opportunity for intellectual growth. To suggest that these would not be irremediable consequences it to make a mockery of equitable principles respecting pendente lite relief, and to defy the intention of Congress when it provided in the Evarts Act, Act of March 3, 1891, 26 Stat. 826, for appellate review of grants or denials of injunctive relief.

I find most disturbing the signals which have gone out from this court to the district courts of this circuit with respect to class action determinations. We seem to be saying that we have totally abdicated all responsibility

for making Rule 23 serve its intended remedial purposes. This last signal is the most disturbing of all, because it removes completely from appellate review pendente lite review of denials of class action injunctive relief in civil rights cases. In most economic class action cases, e.g., cases under § 10(b) of the Securities Act of 1934,[3] a preliminary injunction in favor of the individual plaintiff will, for all practical purposes, fully protect the entire class. A preliminary injunction against a deceptive practice or a false proxy statement will terminate the ongoing effect of either. In such case a denial of pendente lite injuctive relief in the individual's case will be appealable, and that appeal will inure to the benefit of the economic class whether or not the district court granted class action treatment. Thus, instances in which an economic class will be subjected pendente lite to a continuing course of illegal conduct will be comparatively rare.

In the civil rights area of the law, however, an individual voter may be registered and allowed to vote pendente lite, an individual child plaintiff may be transferred and enrolled pendente lite in a desegregated school, an individual female may be promoted pendente lite, while

3. 15 U.S.C. §78j(b); See Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 (1974).

the discrimination against the class of which each was a member continues. If the district judge is favorably disposed to the underlying civil rights claim, grants class action treatment, and affords injunctive relief benefiting the class, the defendant will be able to appeal under § 1292(a)(1). If, however, that district judge is unfavorably disposed, the panel majority opinions has indicated to him precisely how to shield from an appellate review his unwillingness to grant pendente lite relief to the class.

All of our opinion dismantling opportunities for review of district court actions in class action cases refer, in one way or another, to the diluvium consequences upon our caseload of any other than door closing rules. In Link v. Mercedes Benz, supra, I observed that an actual count of § 1292 (b) applications belied any need for such a concern. 550 F.2d at 873-74. I am equally convinced that dismantling of the protection afforded to potential class members by the availability of pendente lite appellate review pursuant to § 1292(a)(1) will have about as significant an effect on our appellate caseload as taking a bucket of water out of the Delaware River today will have on tomorrow's tide at Cape May. The real issue is this court's hospitality or inhospitality to class actions, particularly those asserted on behalf of minorities. The vibrations I feel are decidedly hostile.

This case warrants the court's in banc attention. If

the Supreme Court is at all interested in the availability of pendente lite injunctive relief in civil rights class actions, it warrants that Court's attention as well.

Judge Adams, too, believes that this case warrants the Court's in banc attention.

APPENDIX C

Opinion of the District Court

UNITED STATES DISTRICT COURT,
W. D. PENNSYLVANIA.

JO ANN EVANS GARDNER

v.

WESTINGHOUSE BROADCASTING COMPANY

Civil Action No. 75-614

February 3, 1976.

ROBERT N. HACKETT, ESQ.
Pittsburgh, Pa.,
for plaintiff.
WENDELL G. FREELAND, ESQ.
Pittsburgh, Pa.
for defendant.

MEMORANDUM AND ORDER

McCUNE, District Judge

The subject of this suit is alleged sex discrimination. We consider a motion for class action determination filed pursuant to Local Rule 34(c) on July 9, 1975. By stipulation of counsel argument on the motion was postponed (in order to allow some time for discovery) until October 30, 1975. On October 30, 1975, the issue was

argued and briefs have been considered. The class action is brought under Rule 23(b)(1) and (2). The action concerns defendant's radio station, KDKA.

On the same day an additional motion was filed to require defendant to answer interrogatories concerning the make up of the employee rosters of six additional radio stations owned and operated by defendant which are located in other cities. The issue on the second motion is whether this suit will be confined to KDKA Broadcasting in Pittsburgh, Pa., or expanded on a nationwide basis to include all of the defendant's radio stations located in six other cities. There will be no need to consider the second motion unless we certify the action as a class action.

The plaintiff is Dr. Jo Ann Evans Gardner who unsuccessfully sought employment as a radio talk show hostess on the defendant's radio station, KDKA. It is alleged that she read in the radio-television column of a Pittsburgh newspaper that the radio station was looking for a male to fill the position of talk-show host and a female to be a consumer reporter. She applied for the position as talk-show host but was not hired for that position. She alleges that the job was given to a male and that she was the subject of discrimination.

In answers to interrogatories, plaintiff describes

hereself thus: "I am articulate, well educated, quick witted, well spoken and experienced in public speaking. I am knowledgeable in the field of psychology and interact well with people. I enjoy conversation. I have a clear, pleasant voice which is lively, interesting and transmits well by radio communication. Compared with the men who are talk-show hosts, I would offer a new and different personality attractive to another wide audience and this would help Westinghouse Broadcasting capture more listeners, increase its ratings and hence its revenues."

She seeks to represent all women who are employed, have been employed, have unsuccessfully sought to be employed and might be employed by defendant as professionals, officials and managers in its broadcasting staff, or as technicians, salesworkers or otherwise.

The defendant argues that this action should not be certified as a class action because plaintiff had applied for a very special job which demands specific talent and expertise and thus there are no questions of law or fact common to the class of women whom she seeks to represent as required by Rule 23(a)(2) and further, that the claims or defenses of the parties are not typical of the claims or defenses of the class as required by Rule 23(a)(3).

The defendant further argues that under Rule

23(b)(1)(A) and (B), there is no risk of inconsistent or varying adjudications with respect to individual members of the class because there was only one opening for a talk-show host which required a person with unique artistic ability and an adjudication with respect to the plaintiff would not impair or impede the ability of others to protect their interests. Defendant argues that under 23(b)(2) the defendant has not acted on grounds generally applicable to the class. Further, defendant argues that the questions of law and fact affect the plaintiff alone, due to her unique claim, and that she has nothing in common with the ordinary day-to-day applicant for a job at KDKA. Therefore, a class action is not superior to other available methods for the fair adjudication of the controversy.

In summary, the claim of defendant is that one seeking a single, unique job has nothing in common with other members of a class of women who have not been hired or promoted or who have been discharged.

I suppose the facts which will eventually be considered will be somewhat unique as regards the plaintiff. Whether she was qualified as atalk-show host will be more difficult to determine than whether a bookkeeper or a secretary or a salesperson is qualified.

According to answers to interrogatories, KDKA

Broadcasting has eleven departments, a few of which employ people requiring some talent, e.g., the Editorial Writer's Department and the News Department, including news announcers and the Talent Department, including departments where peculiar talent may or may not be required such as the Business and General Services Department and the Personnel and Administrative Coordinator's Department. In all Departments there are only 78 employees, of whom 21 are females holding jobs of every description. From January 1, 1972, to the time of the filing of the answers, 28 females were hired by the radio station. From January 1, 1972, to the time of filing answers to interrogatories, 6 females were discharged, two of whom were telephone operators and receptionists, one of whom was a secretary, one an accounting clerk, one a traffic correlator and one an account executive. The plaintiff makes reference to no other individual. She alleges broad based discrimination as the result of her personal experience at KDKA.

The first duty imposed upon the court under Wetzel v. Liberty Mutual Insurance Company, 508 F. 2d 239 (3rd Cir. 1975) is to determine if the four prerequisites for a class action, listed in Rule 23(a), have been met. At least two of the four prerequisites are missing here. Rule 23(a)(2) requires questions of law and fact common to the class and 23(a)(4) requires that the representative parties will fairly and adequately protect the interests of the

class.

Adequate representation depends on two factors: (a), the plaintiff's attorney must be qualified and we find that he is qualified and (b), the plaintiff must not have interests antagonistic to those of the purported class.

Dealing with the last statement first, it is our view that plaintiff may well have antagonistic interests to those women now employed by defendant. Plaintiff seeks the job as talk-show host. Is this objective antagonistic to the interests of the women now employed at KDKA who may seek promotion to the job? It is difficult to say but since there is only one job available there may be several women who consider themselves qualified and who would intend to compete with plaintiff. Thus the class, or part of it, may well be in conflict with plaintiff. At least this query points up the lack of commonality inherent in plaintiff's situation vis-a-vis the members of the proposed class. We conclude that there are no questions of law or fact common to the class of women whom plaintiff seeks to represent as required by Rule 23(a)(2) and plaintiff's claim is not typical of the claims of the members of the proposed class as required by Rule 23(a)(3). Accordingly, we refuse to certify this action as a class action.

UNITED STATES DISTRICT COURT,
W. D. PENNSYLVANIA.

JO ANN EVANS GARDNER

v.

WESTINGHOUSE BROADCASTING COMPANY,

Civil Action No. 75-614

ROBERT N. HACKETT, ESQ.
Pittsburgh, Pa.,
for plaintiff.
WENDELL G. FREELAND, ESQ.
Pittsburgh, Pa.,
for defendant.

Order

AND NOW, February 3, 1976, the motion of plaintiff for class action determination is denied. The motion to compel answers to interrogatories concerning six additional radio stations is denied.

BY THE COURT,

/s/ Barron P. McCune,
District Judge

APPENDIX D

Act of June 25, 1948, c.646, 62 Stat. 929; as amended, 28 U.S.C. § 1292:

§ 1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in

which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.